



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████ Respondent

DECISION

Case #: FOF - 169375

Pursuant to petition filed October 13, 2015, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify ██████████ from receiving FoodShare benefits (FS) one year, a hearing was scheduled for November 24, 2015 rescheduled to assure that the address to which the notice was mailed was correct, a hearing was conducted on Wednesday, January 13, 2016 and Respondent did appear.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Office of the Inspector General
Department of Health Services - OIG
PO Box 309
Madison, WI 53701
By: Kevin Rinka

Respondent:

██████████
██████████
██████████

█

ADMINISTRATIVE LAW JUDGE:

David Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ██████████) is a resident of Milwaukee County and has been a FoodShare recipient.
2. On October 16, 2015, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that Respondent used FoodShare benefits to purchase items that he was not entitled to use.

3. The FoodShare benefits involved in the case were issued to [REDACTED]. [REDACTED] was incarcerated in March 2015. In late March 2015 [REDACTED] reported to a prison ministry worker that his FoodShare card was lost or stolen when he transferred between correctional facilities.
4. [REDACTED] was a FoodShare household of 1.
5. Respondent does not know [REDACTED].
6. [REDACTED]'s FoodShare benefits were used on June 8, 2015 at a [REDACTED] in Milwaukee with the [REDACTED] [REDACTED] card of Respondent being used with the purchase. This linked Respondent with the use of [REDACTED]'s card.
7. Petitioner investigated and found that [REDACTED]'s FoodShare card was used to purchase items at 4 different stores and Respondent's card was used at those same stores within 4 minutes of [REDACTED]'s. This was in less than a 3.5 hour period on June 8, 2015. The total amount of the purchases using [REDACTED]'s FoodShare card in conjunction with Respondent's FoodShare card on June 8, 2015 were \$167.77.
8. The exact transactional history for the card usage noted at Finding #s 4 and 5 on June 8, 2015 was as follows:

Respondent card	[REDACTED] card	
9:04 AM / \$57.94	9:02 AM / \$29.03	both at store # [REDACTED]
9:39 AM / \$35.49	9:35 AM / \$70.31	both at store # [REDACTED]
11:43 AM / \$28.94	11:41 AM / \$50.41	both at store # [REDACTED]
12:17 PM / \$30.17	12:18 PM / \$18.02	both at store # [REDACTED]

DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt as to their existence.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See, *John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

Petitioner argues that someone must have seen him enter a card number on a keypad at the first store and then followed him from store to store reusing Respondent’s number. This is just nonsensical. [REDACTED]’s card is actually swiped before Respondent’s in the first 3 sets of transactions. Further, the idea that someone was following Respondent around on June 8th and checking out at virtually the same time at 4 different stores stretches the imagination too far. It is conceivable that Respondent was shopping with someone and they were using [REDACTED]’s card is possible but that was not Respondent’s defense and would not exonerate him here. Based upon the record before me, I find that the petitioner has established by clear and convincing evidence that Respondent intentionally violated FS program rules, and that this violation was the first such violation committed by Respondent. Therefore, the petitioner correctly seeks to disqualify Respondent from the FS program for one year.

I will note, however, that the Department’s notice indicates that Respondent used \$1080.45 of the benefits on [REDACTED]’s FoodShare card. The only linked transactions are the \$167.77 described in the Findings. Nonetheless, this decision does not address the amount of the overissuance and if an overpayment notice has been issued to Respondent he must file a separate appeal as to the amount.

CONCLUSIONS OF LAW

1. The respondent violated, and intended to violate, the FS program rule specifying that FoodShare benefits may only be used for the household to which they were issued.
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.

NOW, THEREFORE, it is

ORDERED

That the petitioner's determination is sustained, and that the petitioner may make a finding that Respondent committed a first IPV of the FoodShare program and disqualify the respondent from the program for one year, effective the first month following the date of receipt of this decision.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

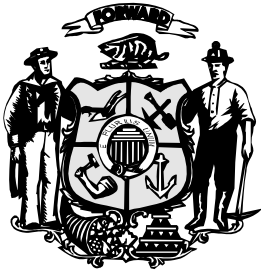
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 29th day of January, 2016

\sDavid Fleming
Administrative Law Judge
Division of Hearings and Appeals

c: Office of the Inspector General - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
Kevin Rinka - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on January 29, 2016.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
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